IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

SANDRA K. TOWRY, Debtor.	No. 03-24461 Chapter 7
JAVIER J. FARIAS, Plaintiff, vs. SANDRA K. TOWRY, Defendant.	Adv. Pro. No. 04-2013

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiff seeks a determination of nondischargeability pursuant to 11 U.S.C. § 523(a)(15) and dismissal of the bankruptcy case under 11 U.S.C. § 707(a) for lack of good faith. Presently before the court is the debtor's motion for partial summary judgment as to the § 523(a)(15) issue, which by implication raises the standing of plaintiff, the debtor's former father-in-law. As set forth below, this court finds that partial summary judgment in favor of the debtor is appropriate. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I) and (O).

I.

The debtor Sandra K. Towry filed for bankruptcy relief under chapter 7 on December 19, 2003, and the plaintiff, Javier J. Farias, timely commenced the present adversary proceeding on March 18, 2004. The debtor's motion for partial summary judgment that is now before this court was filed by the debtor on September 20, 2004.

In her personal affidavit filed in support of her motion, the debtor states that she was previously married to Erik James Borchgrevink; that during the marriage, the plaintiff, who is Borchgrevink's father, agreed to be a signatory on a promissory note so that she and Borchgrevink could purchase a 2002 Dodge Stratus automobile; that in connection with the debtor's and Borchgrevink's divorce, they entered into a marital dissolution agreement which provided that the debtor would repay the loan secured by the automobile; and that "Borchgrevink did not owe any money on the 2002 Dodge Stratus and would not be harmed by the discharge of this debt." The debtor concludes her affidavit by stating that "[d]ischarging this debt will result in a benefit to me" and "[d]ischarging this debt will not result [in] any detrimental consequences to a spouse, former spouse or child of mine."

In her memorandum of law filed in support of her motion, the debtor notes that under § 523(a)(15), a debt arising from a separation agreement, divorce decree or other order of a court of record incurred in the course of a divorce or separation is excepted from discharge unless "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." *See* 11 U.S.C. § 523(a)(15)(B). According to the debtor, because she "will receive a benefit from the discharge of this debt" and "[t]here will be no detrimental consequence[s] suffered by any of the specified classes of people contained in § 523(a)(15)(B)," she is "entitled, according to the plain language of the statute, to judgment as a matter of law." In support of this proposition, the debtor cites the following cases: *Estate of Bryant v. Bryant (In re Bryant)*, 260 B.R. 839, 848 (Bankr. W.D. Ky. 2001)("This Court will follow the majority of cases that have considered the issue of standing in § 523(a)(15) cases and holds that only a spouse, former spouse or child of the Debtor may file a complaint under the statute."); *Brian M. Urban Co., L.P.A. v. Wenneman (In re Wenneman)*, 210 B.R. 115, 119 (Bankr. N.D. Ohio 1997)("Thus, upon a complete reading of the statute, § 523(a)(15) does not give standing to non-spouse debtors."); *Woodruff, O'Hair & Posner, Inc. v. Smith (In re Smith)*, 205 B.R. 612, 616 (Bankr. E.D. Cal. 1997)("So, according to the legislative history, only the spouse, former spouse, and child of a debtor have standing under section 523(a)(15)."); *Woloshin, Tenenbaum and Natalie, P.A. v. Harris (In re Harris)*, 203 B.R. 558, 561 (D. Del. 1996)("Therefore, I agree with the court in *Finaly* that only the debtor's spouse or former spouse can maintain an action under § 523(a)(15)."); *Douglas v. Douglas (In re Douglas)*, 202 B.R. 961, 963 (Bankr. S.D. Ill. 1996)("It is only the obligation owed to the spouse or former spouse—an obligation to hold the spouse or former spouse harmless— which is within the scope of this section [523(a)(15)]."); *Barstow v. Finaly (In re Finaly)*, 190 B.R. 312, 315

(Bankr. S.D. Ohio 1995)("Because the debt in question is owed to the parents of the spouse, the plaintiff cannot argue for nondischargeability under § 523(a)(15).").

The plaintiff filed a response and memorandum of law in opposition to the debtor's motion on October 14, 2004. He states that he does not dispute the statements set forth in the debtor's affidavit and concedes that "11 U.S.C. § 523(a)(15)(B) is not applicable to him as discharging this debt has no detrimental consequences to a spouse, former spouse or child of the debtor." The plaintiff asserts, however, that he is entitled to proceed under 11 U.S.C. § 523(a)(15)(A) because the debtor "has the ability to pay the debt owed to the Plaintiff from income that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor." To establish the debtor's ability to pay, the plaintiff tenders copies of the debtor's 2003 Wage and Tax Statements which reveal gross annual income of $31,185.50. He also references the debtor's Schedule I filed in her bankruptcy case which shows gross monthly income of $2,134.86.

II.

Section 523(a)(15) of the Bankruptcy Code provides:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
> ....
> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—
>
> > (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation,

> preservation, and operation of such business; or
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15).

In his memorandum of law, the plaintiff asserts that "the plain reading of this statute is clear that a debt incurred by a debtor in the course of a divorce that is memorialized by court action may be excepted from discharge if either of two circumstances exist." For the proposition that he can proceed under § 523(a)(15)(A) alone without reference to (a)(15)(B), the plaintiff cites *In re Soderlund*, wherein the court stated "[w]hile (B) can be applied only by applying a cost-benefit analysis to the former spouses and their present obligations to self and others, (A) can be invoked without that inquiry." *Zimmerman v. Soderlund (In re Soderlund*), 197 B.R. 742, 747 (Bankr. D. Mass. 1996).

Notwithstanding the plaintiff's purported "plain reading" of § 523(a)(15), neither his interpretation nor that of the court in *Soderlund* is supported by § 523(a)(15)'s plain language or its legislative history. Contrary to the plaintiff's assertion that a debt which falls within the purview of (a)(15) is excepted from discharge *if* either (A) or (B) is established, the converse is true—the statute provides that such a debt is excepted from discharge *unless* either (A) or (B) is proven. *See Gibson v. Gibson (In re Gibson),* 219 B.R. 195, 201 (B.A.P. 6th Cir.1998). As stated by the bankruptcy court in *In re Beach*:

> Section 523(a)(15) is broken down into two sections. First, Section 523(a)(15) describes the type of debt that is considered nondischargeable. [Footnote omitted.] This paragraph ends with the word "unless." After the "unless" there are two subsections characterized by this Court as "affirmative defenses." [Citation omitted.]

Beach v. Beach (In re Beach), 203 B.R. 676, 680 (Bankr. N.D. Ill. 1997). *See also Crawford v. Crawford (In re Crawford),* 236 B.R. 673, 676 (Bankr. E.D. Ark. 1999)("Sections 523(a)(15)(A) and

(B) provide two exceptions to the general provision that property settlement debts are nondischargeable."). Thus, rather than two separate bases for a finding of nondischargeability, either of which may be asserted by a creditor, subparts (A) and (B) provide defenses or exceptions to the presumption of nondischargeability. *See Euell v. Euell (In re Euell),* 271 B.R. 388, 392 (Bankr. D. Colo. 2002)("Section 523(a)(15) begins with a general exception to discharge for non-support divorce-related debts.... The statute, however, includes two possible exceptions to the exception: (A) if the debtor cannot pay and still provide necessary support; or (B) if the detriment to the non-debtor spouse or child outweighs the benefit to the debtor.").

Furthermore, the courts, in near unanimous agreement, have concluded that because subparts (A) and (B) of § 523(a)(15) are written in the disjunctive with the use of the word "or" between the two clauses, a debtor may prevail if he establishes either subpart (A) or (B). *See Romer v. Romer (In re Romer),* 254 B.R. 207, 212 (Bankr. N.D. Ohio 2000)("Since the two limitations to the discharge exception of § 523(a)(15) are read in the disjunctive, a debt will be subject to a bankruptcy discharge upon a finding by the Court that either limitation is applicable."); *In re Beach*, 203 B.R. at 680 ("[T]he use of the word 'or' between the two affirmative defenses indicates the debtor only needs to satisfy the burden under either (A) or (B)."); *In re Smith,* 205 B.R. at 616 ("If either exception applies, then the debt is dischargeable."); *Becker v. Becker (In re Becker),* 185 B.R. 567, 569 (Bankr. W.D. Mo.1995) (The language of § 523(a)(15) "sets up a rebuttable presumption that a property settlement obligation arising from a divorce is nondischargeable unless the debtor can prove" either § 523(a)(15)(A) or (B)."). Accordingly, it is not determinative that a creditor may establish under § 523(a)(15)(A) that a debtor has the ability to pay the debt in question. The debt may still be discharged if the debtor proves §

523(a)(15)(B). *See Taylor v. Taylor,* 199 B.R. 37, 41 n.3 (N.D. Ill. 1996)(debt was dischargeable, even though debtor had ability to pay, based on lack of detriment to nondebtor spouse; to hold otherwise "would render § 523(a)(15)(B) effectively meaningless"); *Melton v. Melton (In re Melton),* 238 B.R. 686, 694 (Bankr. N.D. Ohio 1999)("[A] debtor may be found to have the ability to pay, but would still be entitled to a discharge if the benefit to the debtor outweighs the detrimental consequences to the former spouse."); *Armstrong v. Armstrong (In re Armstrong*), 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996)("Even though the debtor in this case has the ability to pay the debt in question, the debtor may still obtain a discharge if he can prove by a preponderance of the evidence that 'discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the debtor.'"); *In re Smither*, 194 B.R. 102, 110 (Bankr. W.D. Ky. 1996)("Even if the debtor has the ability to pay a property settlement debt for purposes of 11 U.S.C. § 523(a)(15)(A), the Debtor may still obtain a discharge of the obligation if the Debtor can prove, by a preponderance of the evidence, that "discharging such debt would result in a benefit to the Debtor that outweighs the detrimental consequences to a spouse, former spouse or child of the Debtor.").

In light of the statute's plain language, this court must respectfully disagree with the *Soderlund* court's conclusion that nondischargeability may be established by mere ability to pay under subpart (A), without regard to subpart (B). No reported decision has followed *In re Soderlund*, and to the contrary, its holding has been universally rejected. *See In re Euell*, 271 B.R. at 392; *In re Dollaga*, 260 B.R. 493, 497 (B.A.P. 9th Cir. 2001); *Sanders v. Sanders (In re Sanders)*, 236 B.R. 107, 110 (Bankr. S.D. Ga. 1999); *In re Wenneman*, 210 B.R. at 118; *In re Beach*, 203 B.R. at 678 n.3; *In re Harris*, 203 B.R. at 562. As stated by the *Euell* court:

> The *Soderlund* court's interpretation renders clause (B) superfluous. It is true that clause (A) alone requires no inquiry into a cost-benefit analysis between spouses, but clause (B) does. The *Soderlund* court ignores the fact that if the debtor establishes an exception to the exception under either clause, the debt becomes dischargeable. Once clause (B) is considered, it becomes clear that the third-party creditor cannot prevail under this statute.

In re Euell, 271 B.R. at 392.

Similarly, the court in *Smith* recognized that while § 523(a)(15) does not specify who may bring a complaint under that section or expressly restrict standing to a debtor's spouse, former spouse, or dependent:

> The second exception effectively [footnote omitted] limits standing under section 523(a)(15) to a debtor's spouse, former spouse, or child. Section 523(a)(15)(B) provides that a non-support debt shall be discharged if "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor."
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> If a debt is owed to someone other than a spouse, former spouse, or child of the debtor, discharge of the debt will always result in a benefit to a debtor that is greater than the detriment to his or her spouse, former spouse, or child. This is true because, in this circumstance, the benefit to a debtor is necessarily positive, and the detriment to the spouse, former spouse, or child is necessarily zero. [Footnote omitted.]
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> > As the bankruptcy court stated in *Beach*:
> > If a third party brought a complaint under Section 523(a)(15) seeking to discharge a debt in which the former spouse has no liability, the debtor could always raise the affirmative defense set forth in Section 523(a)(15)(B). The debtor would succeed because the former spouse suffers no detrimental consequences when the debt is discharged. Under this plain reading of Section 523(a)(15) as a whole, it is clear that third parties are not contemplated to fall within its protective bounds despite the absence of explicit language limiting it to former spouses.

In re Smith, 205 B.R. at 615-617 (quoting *In re Beach*, 203 B.R. at 680).

Although it is not necessary to examine § 523(a)(15)'s legislative history in light of the statute's plain meaning, *see Koenig Sporting Goods, Inc. v. Morse Rd. Co. (In re Koenig Sporting Goods, Inc.)*, 203

F.3d 986, 988 (6th Cir. 2000) ("If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.... When a statute is unambiguous, resort to legislative history and policy considerations is improper."); "[t]he language of section 523(a)(15) and its legislative history are not in conflict." *In re Smith*, 205 B.R. at 617.

Section 523(a)(15)'s legislative history explains that a debt may be discharged if *either* subpart (A) or subpart (B) is established and contemplates the current situation, that a debt will be discharged under (B) if the nondebtor spouse suffers little or no detriment from the debtor's nonpayment. According to Congressman Brooks' floor statement:

> [T]he debt will remain dischargeable if paying the debts would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents.... The debt will *also* be discharged if the benefit to the debtor of discharging it outweighs the harm to the obligee. For example, if a nondebtor spouse would suffer little detriment from the debtor's nonpayment of an obligation required to be paid under a hold harmless agreement (perhaps because it could not be collected from the nondebtor spouse or because the nondebtor spouse could easily pay it) the obligation would be discharged. The benefits of the debtor's discharge should be sacrificed only if there would be substantial detriment to the nondebtor spouse that outweighs the debtor's need for a fresh start.

In re Beach, 203 B.R. at 678-79 (quoting 140 CONG. REC. H10770 (daily ed. October 4, 1994)(emphasis supplied)).[1]

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[1]In the statement immediately preceding this quoted passage, Congressman Brooks states, "This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts." Because of this statement, the court in *Soderlund* concluded that the entire committee report was written in connection with a previous version of the legislation which listed subparts (A) and (B) in the conjunctive rather than disjunctive and that therefore, the legislative history was not instructive. *See In re Soderlund*, 197 B.R. at 747. The *Harris* court rejected this analysis, concluding that the legislative description of § 523(a)(15) was written for the enacted version because immediately after the above quoted sentence, the report, as quoted in the text of this memorandum, goes on to state that:

(continued...)

Additionally, § 523(a)(15)'s legislative history makes it clear that standing by third parties was not intended. As Congressman Brooks' floor statement further indicates:

> The exception applies only to debts incurred in a divorce or separation that are owed to a spouse or former spouse, and can be asserted only by the other party to the divorce or separation. If the debtor agrees to pay marital debts that were owed to third parties, those third parties do not have standing to assert this exception, since the obligations to them were incurred prior to the divorce or separation agreement. It is only the obligation owed to the spouse or former spouse—an obligation to hold the spouse or former spouse harmless—which is within the scope of this section.

Id. at 679.[2]

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[1](...continued)
"*In other words*, the debt will remain dischargeable *if* paying the debt would reduce the debtor's income below that necessary for the support of the debtor and the debtor's dependents.... *The debt will also be discharged if* the benefit to the debtor of discharging it outweighs the harm to the obligee." *In re Harris*, 203 B.R. at 562 (quoting 140 CONG. REC. H10770 (daily ed. October 4, 1994))(emphasis supplied in *Harris*). These two statements obviously reference alternative use of the two clauses, as the *Harris* court reasoned. *Id*.

Furthermore, the legislative history statement quoted in *Soderlund* is not inconsistent with the two sentences which follow it. The confusion arises from the fact that the enacted language is in the negative, the debt will be nondischargeable if the debtor does *not* have the ability to pay or discharge outweighs detriment. The legislative history on the other hand, is written in the positive, the debt is nondischargeable if the debtor has the ability and the detriment outweighs the benefit. Clearly, under either sentence, nondischargeability occurs only if the debtor loses on both affirmative defenses. For the *Soderlund*'s interpretation of § 523(a)(15) to prevail, the quoted legislative history sentence would have to have read: "This subsection will make such obligations nondischargeable in cases where the debtor has to ability to pay them *or* the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts."

[2]As the litany of cases cited in the debtor's memorandum of law indicates, the vast majority of courts considering the standing issue have concluded that parties other than a spouse, former spouse, or child of the debtor do not have standing to prosecute a § 523(a)(15) claim. The courts in the minority on this issue, in addition to *Soderlund*, include

> two other decisions that appear, at first blush, to have allowed third parties to bring a Section 523(a)(15) claim. Closer examination of the opinions in those cases leads to a different conclusion. In *In re LeRoy*, 251 B.R. 490 (Bankr. N.D. Ill.2000), the court appeared to consider a finding that the divorce attorneys for the debtor's ex-spouse had

(continued...)

In the present case, the debtor's affidavit establishes that her former spouse is not obligated on the debt in question and thus would not be harmed if the debtor's liability is discharged. The affidavit also establishes that discharge of the debt will benefit the debtor. *See In re Beach*, 203 B.R. at 681 n.8 ("The Court cannot envision a scenario where the discharge of a debt owed by a debtor would not be a benefit."). As previously noted, the plaintiff states in his response that he does not dispute the facts set forth in the debtor's affidavit. Accordingly, there is no factual dispute to the debtor's contention that "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor." The debtor having proven the affirmative defense of § 523(a)(15)(B), she is entitled to summary judgment with respect to the plaintiff's nondischargeability claim under § 523(a)(15). An order to this effect will be entered upon the filing of this opinion.

FILED: October 28, 2004

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

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[2](...continued)
standing under (a)(15). The Court did not specifically find standing, however, ruling instead that, even if it were assumed that the attorneys had standing, the debt was dischargeable under subsections (A)(inability to pay) and (B)(lack of detriment to non-debtor spouse who could better afford to pay the bill). *Id*. at 508. In *In re Sanders*, 236 B.R. 107 (Bankr. S.D. Ga.1999), the court also straddled the fence, finding in the alternative, that the benefit to the debtor of discharge outweighed the detriment to the non-debtor spouse.
In re Euell, 271 B.R. at 392.